

REPRESENTATIVES OF M. F. MERRITT.

FEBRUARY 9, 1904.—Committed to the Committee of the Whole House and ordered to be printed.

Mr. MAHON, from the Committee on War Claims, submitted the following

REPORT.

[To accompany S. 352.]

The Committee on War Claims, to whom was referred the bill (S. 352) for the relief of the representatives of M. F. Merritt, deceased, submit the following report:

The report of Mr. Warren, made to the Senate December 16, 1903, is so full and conclusive that your committee have adopted it as a fair statement of the grounds for relief, a copy being hereto appended and made part of this report.

Your committee recommend the passage of the bill.

[Senate Report No. 115, Fifty-eighth Congress, second session.]

The Committee on Claims, to whom was referred the bill (S. 352) for the relief of the representatives of M. F. Merritt, deceased, have duly considered the same and now beg to report the bill back to the Senate with recommendation that it do pass without amendment.

A similar bill was introduced in the Fifty-seventh Congress, was favorably reported, and passed the Senate in the second session thereof. The committee have adopted and submit herewith the above-mentioned report, numbered 2629.

[Senate Report No. 2629, Fifty-seventh Congress, second session.]

The Committee on Claims, to whom was referred the bill (S. 5955) for the relief of the representatives of M. F. Merritt, deceased, have had the same under consideration and respectfully submit the following report and recommend that said bill do pass without amendment.

The purpose of the present bill is to permit the representatives of M. F. Merritt, deceased, to submit to the Court of Claims his claim for the additional cost imposed upon him by the action and inaction of the Government while constructing the light-draft monitor *Cohoes*. The general rules of the court are to be in force, and the right to appeal to the Supreme Court remains unimpaired.

It is claimed that the decedent has not been fully paid for the extra work which he performed at the request of the United States upon the monitor *Cohoes*, and also that the United States, for its own advantage and by its own orders, delayed the fulfillment of the contract two years and three months, thus increasing to him the cost of all the material and labor furnished by him for the construction of the vessel. The contract, dated April 17, 1863, required the completion of the vessel by the 17th of October, 1863, but she was not actually completed until January 19, 1866.

As early as March, 1867, the injury resulting to him and the contractors for similar monitors from the desire of the Government to get better monitors than the contracts called for was recognized by Congress, and a statute was approved by the President March 2, 1867, directing the Secretary of the Navy to report, in a tabulated form, certain specified facts for the guidance of Congress. The Secretary, having no personal knowledge of the matters involved, designated Commodore Marchand and two other naval officers to make the inquiries and report to him. These officers failed to report to the Secretary any fact committed by Congress to his investigation, but assumed to act judicially, and reported what they "determined to be due" to each contractor. Since the report of the Secretary, transmitting the quasi judicial determinations of the Marchand board, Congress has on several occasions referred to the Court of Claims for adjudication the claims thus passed upon, as follows: River and harbor monitors *Tippecanoe*, *Manayunk*, and *Canonicus*; light drafts *Squando*, *Nauset*, *Umpqua*, *Wassuc*, *Naubuc*, *Shawnee*, *Modoc*, *Suncook*, *Yazoo*, *Casco*, and *Wassaw*, 14 in all.

Concerning the action of Commodore Marchand, two witnesses for the United States testified before the Court of Claims as follows:

"We think it demonstrable beyond all question that the Marchand board did not have authority to adjudicate these claims; that it did not accord to the claimants an opportunity to present their cases; that it did not report the facts called for by the act of March 2, 1867, or by the letter of the Secretary of the Navy creating the board; and that it did report certain conclusions of both law and fact which it had no jurisdiction to consider and that are contrary to the right and justice of the matter."

By the act of March 2, 1867, the Secretary of the Navy was directed to investigate the claims of all contractors for building vessels of war and steam machinery for the same under contracts made after May 1, 1861, and prior to January 1, 1864, on the following basis: The act required him "to ascertain the additional cost which was necessarily incurred by each contractor in the completion of his work, by reason of any changes or alterations in the plans and specifications required and delays in the prosecution of the work occasioned by the Government, which are not provided for in the original contract."

The act further required the Secretary to report to Congress a tabular statement of each case, which should contain the name of the contractor, a description of the work, the contract price, the whole increased cost of the work over the contract price, and the amount of such increased cost caused by the delay and the action of the Government as aforesaid, and the amount paid the contractor over and above the contract price.

It will be observed that by the language of this statute the Secretary of the Navy was not to adjudicate upon the rights or claim of the contractors. He was not authorized to even inquire into the legal result as to what, if anything, might be due to them. Nor did it give him authority to refer any such inquiry to a naval board or other subordinate tribunal. It became his simple duty under the statute to "ascertain" certain facts that were prescribed in the statute in terms so explicit that they should not be misunderstood.

The main and comprehensive fact directed to be ascertained was "the additional cost which was necessarily incurred by each contractor in the completion of his work by reason of any changes or alterations in the plans and specifications required, and delays in the prosecution of the work occasioned by the Government, which were not provided for in the original contract."

To come at this fact, he was further required to report to Congress a tabulated statement of certain other facts, and among them "(1) the whole increased cost above the contract price," and "(2) the amount of such increased cost caused by the delay and action of the Government as aforesaid."

The Marchand board, to whom the Secretary committed this investigation, instead of ascertaining the "whole increased cost of work over the contract price," and possibly too anxious to finish its labors to enter upon so elaborate and extended an inquiry, made no inquiry at all, but contented themselves with substituting in their tabulated report a column entitled "Whole increased cost of work over the contract price as claimed by the contractors."

Whether the amounts thus claimed by the contractors were correct or not the board did not report, but merely stated the plaintiff's claim.

In respect of the next statement required by the act, instead of ascertaining the amount of such increased cost, "caused by the delay and action of the Government as aforesaid," they found the "amount of such increased cost caused by the delay and action of the Government as determined by the board to be due."

The difficulty in the construction of the light-draft monitors, to which the *Cohoes* belonged, led to an extended investigation, in the year 1864, by the Joint Committee on the Conduct of the War. In a letter dated December 14, 1864, and addressed to the chairman of that committee, Hon. G. V. Fox, Assistant Secretary of the Navy, made the following statements:

"An invulnerable vessel of light draft not only had never been attempted, but an extended inquiry seemed to forbid the consideration of the subject. Nevertheless, the inventor of the *Monitor*, at the request of the Department, and after several weeks' consideration of the subject, proposed a general plan of a monitor to draw about 6 feet and 4 inches of water, to have a single iron turret 8 inches thick, with two 11-inch guns, and to be otherwise well protected against the projectiles used by the rebels. * * * The Department accepted the general plan of Captain Ericsson, but his offer to build was declined.

"The law requires that advertisements shall be issued and contracts given to the lowest bidder. The elaboration of the plan of Captain Ericsson and the preparation of the drawings and specifications were confided to Chief Engineer Stimers, who was instructed to consult with and follow the directions of that gentleman. * * * Chief Engineer Stimers is responsible for the detailed drawings of the light-draft monitors and for the calculations as to their displacement. It was expected that they would not draw over 6½ feet of water, and be out of water amidships about 15 inches. * * * The *Chimo*, at Boston, was the first one finished. * * * Instead of being 15 inches out of water she was only 3 on the average, showing a miscalculation of 12 inches. The Department immediately removed Mr. Stimers from the position of general superintendent, and placed the question as to what should be done to remedy the difficulties occasioned by his error in the hands of Rear-Admiral Gregory, Chief Engineer Wood, and Captain Ericsson."

In the winter and spring of 1863 the Navy Department prepared plans and drawings for several light-draft steam ironclad monitors, with specifications showing the dimensions, kind, and thickness of the plating, and submitted the same to various contractors for proposals for construction.

The time required in the construction was a material element in the contract, and none were made for a period longer than eight months. So material was the matter of time considered that in the contracts for six months the contractors were to receive \$395,000, while those whose contracts extended to eight months for completion were only to receive \$386,000, or at the rate of \$4,500 per month less; but there was a provision in all contracts then made that if the vessels were completed in less time than provided in the contract the contractor was to receive an additional pay of \$4,500 per month, and if the completion was delayed beyond the period named the Government was to deduct from the contract price at the same rate; that is, \$4,500 per month.

Having accepted the undertaking to build these vessels, the several parties named made arrangements accordingly, having the yards, machinery, etc., necessary therefor, and entered into contracts for the necessary materials, based upon the contracts with the Government, and commenced the work on the several vessels named. About this time Chief Engineer of the Navy Stimers, having returned from Charleston, where he had been sent to make observations as to the conduct of Ericsson's monitors in battle, a consultation was had at the Navy Department, in which (quoting from Mr. Stimers's evidence)—

"The matter was discussed as to whether we had better build our vessels in strict accordance with the letter of the contracts which we were giving out, without any change whatever, or had better take advantage of every such fight and make improvements as we went along, although we fully appreciated that it would delay their completion and add to their cost. Assistant Secretary Fox made the remark that he thought following this course would probably entail an extra cost of a million of dollars for each battle where the monitors were engaged. Well, it was decided that that course should be followed."

Acting upon this theory, the Department commenced forwarding to the contractors orders for changes and drawings before even the keel was laid, and those changes, which in the aggregate affected all parts of the vessel, making in the end almost entirely different vessels, were continued, and the drawings furnished therefor for nearly a year and a half after the time specified in the contract for their completion had elapsed, and from the 23d of June, 1864, for about the period of three months, work was suspended altogether upon the vessels by the orders of the Navy Department, which had then in contemplation some general changes in their construction

which required time to perfect. All of this time, however, the contractors were under heavy expense, for the maintenance of the yards and men, whom they dared not discharge for fear of inability to supply their places, and not knowing on what day their services would be required.

In addition to all this, the prices of labor and materials required for the work and for which the contractors had made provision during the time of the contracts rapidly advanced, so that, as found by the Committee on War Claims of the first session of the Forty-third Congress, iron that at the date of the contracts was worth \$65 per ton advanced during the prolonged time to \$220 per ton and labor from \$2.50 per day to \$4 per day.

There seems to be no question that but for the interference of the Government these vessels would have been completed within the time specified in the contract; that these contractors had the means and ability to do so, and that the heavy losses sustained by reason of the interference of the Government could not have been prevented by any reasonable prudence or foresight on their part, as the labor could not be anticipated, nor could they possibly know, from the frequent changes being made, the kind, quantity, or, in the case of the iron plating, the thickness or size of the plates to be used.

Your committee is of opinion that the legislative relief already afforded to other contractors for light-draft monitors should be extended to claimant.

O